Supreme Court, U. S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION, ET AL,
Respondents

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas

BRIEF OF RESPONDENT MOBIL OIL CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

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JURISDICTION

This Court lacks jurisdiction to review the trial court's refusal to instruct the jury that any award of damages would not be subject to federal income taxes.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal district courts have exclusive subject matter jurisdiction of cases and controversies arising under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq.?

2. Whether this Court has jurisdiction to review the trial court's refusal to instruct the jury that any award of damages would not be subject to federal income taxation where petitioner has failed to comply with the trial court's rules of procedure?

3. Whether federal common law established after the effective date of the Outer Continental Shelf Lands Act may be used to fill gaps in existing federal law and thereby pre-empt existing and otherwise applicable state law?

STATEMENT OF THE CASE

(Included in the excerpt of Respondent's State Appellate Court Brief which is attached as Appendix A.)

ARGUMENT

INTRODUCTION

The Outer Continental Shelf Lands Act does not explicitly or implicitly grant exclusive jurisdiction to the federal district courts over cases and controversies arising out of or in connection with any operation on the Outer Continental Shelf.

This Court is plainly and simply being asked to augment the language of a statute in order to effect an important and far-reaching change in legislation.

"Exclusive" is an adjective; a word used to limit or qualify. When it is used to limit or qualify a congressional grant of jurisdiction it does not have multiple meanings. It is plain, clear, and unambiguous. It does not require elucidation, explanation, or construction. Legislative grants of exclusivity can and usually do eliminate a privilege or franchise. It is an important, significant, and often drastic legislative act. The courts should not assume that responsibility.

I.

THE FEDERAL DISTRICT COURTS DO NOT HAVE EXCLUSIVE JURISDICTION OVER COMMON LAW NEGLIGENCE ACTIONS ARISING ON THE OUTER CONTINENTAL SHELF.

a. State Courts Have General and Concurrent Jurisdiction with the Federal Courts Over Common Law Negligence Actions.

A grant of jurisdiction by Congress to the federal district courts does not, of itself, imply that the jurisdiction is to be exclusive. *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479, 56 S.Ct. 343, 348, 80 L.Ed. 331 (1936). As this Court has stated:

> "Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the federal and state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had

> the power to hear and determine causes of action created by Federal statute. *Robb v. Connolly,* 111 U.S. 637; 4 S.Ct. 544; 28 L.Ed. 542 (1884)."

Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U.S. 481, 490; 32 S.Ct. 205, 206, 56 L.Ed. 516 (1912).

Federal courts have no common law jurisdiction or power except that which is granted by express statutory language. *Rice v. Minnesota & Northwestern R.R. Co.,* 66 U.S. 358, 374, 1 Black 358, 374, 17 L.Ed. 147, 152 (1861). The federal courts had no jurisdiction over common law actions arising on the Outer Continental Shelf until they were granted jurisdiction under § 1333, subsection (b) of Title 43, United States Code. That Congress understood it was extending the jurisdiction of the federal district courts to the Outer Continental Shelf is clearly shown by the sectional analysis of the Senate Bill, S. 1901 as reported:

> "Subsection (b) of Section 4 *extends* original jurisdiction of the federal district courts to cases and controversies arising out of operations on the outer Continental Shelf. . . ." S. Rep. No. 411, 83rd Cong., 1st Sess. (1953). [Emphasis added]

b. Statutes Conferring Federal Jurisdiction Must Be Strictly Construed.

A congressional grant of jurisdiction may be general or limited, concurrent or exclusive. The jurisdiction of federal courts is limited not only by the provisions of Article III of the Constitution, but by acts of Congress. *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 372, 98 S.Ct. 239, 57 L.Ed.2d 274, 281.

Statutes conferring federal jurisdiction must be strictly construed. *McCord v. Dixie Aviation,* 450 F.2d 1129, 1131 (10th Cir. 1971).

Congress has granted exclusivity in a number of jurisdictional statutes. In doing so, it has routinely employed the term "exclusive"; *e.g.,* "The district court shall have original jurisdiction, exclusive of the courts of the state . . ."; "Exclusive jurisdiction in the district court or court of claims . . ."; ". . . Such jurisdiction shall be exclusive of the courts of the states . . ." Sections 1334 through 1361 (Chapter 85) of Title 28 of the United States Code.

It is well settled that if the statute being construed is unambiguous, legislative history may not be consulted to determine its meaning. *Ex Parte Collett,* 337 U.S. 55, 61, 69 S.Ct. 944, 93 L.Ed. 1207, 1211 (1949); *Espinoza v. Farah Mfg. Co.,* 462 F.2d 1331, 1333 (5th Cir. 1972), *aff'd,* 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed. 2d 287 (1973). It is the court's duty to ascertain the purpose of Congress from the plain words it used, neither to "add nor to subtract. . . ." *62 Cases of Jam v. United States,* 340 U.S. 593, 596, 71 S.Ct. 515, 95 L.Ed. 566, 570 (1951). Where Congress has employed a term in one place but excluded it in another, it should not be implied where excluded. *J. Ray McDermott & Co., Inc. v. Vessel MORNING STAR,* 457 F.2d 815, 818 (5th Cir. 1972), *reh. and reh. en banc den.*

Only Congress has the right to prescribe the jurisdiction of the federal district courts. If Congress does not intend to grant exclusive jurisdiction, then the courts may not infer it. *See, Sheldon v. Sill,* 49 U.S. (How.) 441, 448, 12 L.Ed. 1147, 1151 (1850).

Petitioner has failed to demonstrate any practical justification for creating exclusive federal jurisdiction over

common law negligence actions arising on the Outer Continental Shelf. We have historically maintained two separate and distinct lower court systems. Whenever a logical division of their jurisdiction is possible, distinct parameters should be drawn in order to assure that the court that is granted jurisdiction is competent to consider the case. In cases arising on the Outer Continental Shelf, a trial court, whether state or federal, must interpret federal statutory and common law, and state law which is adopted as surrogate federal law to fill the gaps in federal law. *See Chevron Oil v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Petitioner suggests that rather than interpret and apply federal statutory and common law, Texas and Louisiana common law, with the aid of factual issue determination by citizens of the Southern District of Texas, the Texas district court judge should have dismissed the original action, and required the plaintiff to file suit in a federal district court where another judge would undertake to interpret and apply the same bodies of law with the aid of fact finders who are also citizens of the Southern District of Texas.

Exclusive jurisdiction in the federal district courts would put a further burden on the already overloaded federal court dockets and create additional anomalies in the laws applied to workers on fixed as opposed to movable offshore drilling rigs. *See, Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 673, 70 S.Ct. 876, 94 L.Ed. 1194, 1200-1201 (1950). There is ". . . no justification so to distort the ordinary meaning of the statute. Nothing in the text or history of the legislation points to such a reading of what Congress wrote." *62 Cases of Jam v. United States, supra,* 340 U.S. at p. 600, 95 L.Ed. at p. 571.

II.

THIS COURT LACKS JURISDICTION TO CONSIDER THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT ANY AWARD OF DAMAGES WOULD NOT BE SUBJECT TO FEDERAL INCOME TAXATION.

Petitioner failed to comply with the Texas Rules of Civil Procedure and thereby waived any claimed error of the trial judge in refusing to instruct the jury that any award of damages would not be subject to federal income taxation. Rule 273, Texas Rules of Civil Procedure (Appendix B), requires that requests for instructions be made separate and apart from the objections to the charge. The requested instruction must be in writing. It is presented to the court and is used by the court in preparing its charge. Any adverse ruling by the judge should be written on the request as "refused" or "modified as follows: (stating in what particular he has changed or modified it) and given, and exceptions allowed." Rule 276, Texas Rules of Civil Procedure (Appendix C). The judge signs the request, and it then constitutes a bill of exceptions.

The record shows that the prescribed formalities were not complied with (Appendix D), and Petitioner has therefore waived error. *Newman v. Dehli Gas Pipeline Co.*, 517 S.W.2d 635, 636 (Tex. Civ. App.—Tyler, 1974), no writ. There was nothing for the appellate court to review. *First State Bank & Trust Co. of Edinburg v. George*, 519 S.W.2d 198, 205 (Tex. Civ. App. —Corpus Christi, 1974), writ ref'd n.r.e.; *M.L.C. Loan Corp. v. P.K. Foods, Inc.*, 541 S.W.2d 902, 905 (Tex. Civ. App.—Beaumont, 1976), no writ.

III.

PETITIONER WAS NOT ENTITLED TO THE SUBMISSION OF ITS REQUESTED JURY INSTRUCTION ON THE EFFECT OF FEDERAL INCOME TAXES.

Under Texas procedure, an instruction is proper only if it finds support in the evidence and the inferences to be drawn therefrom. *See, Bounds v. Caudle,* 560 S.W.2d 925, 930 (Tex. 1977); *Garcia v. Prescott,* 570 S.W.2d 562, 566 (Tex. Civ. App.—Corpus Christi, 1978), writ ref'd n.r.e.; Hodges, *Special Issue Submission in Texas* 34 (1959).

In *Liepelt,* this Court recognized that the calculation of the effect of income taxes on the decedent's past and future earnings was complicated and held that it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings. Such calculations are full of imponderables such as exemptions or exclusions, tax brackets, and the tax rate, all of which are subject to change. Although a jury's computation is not required to conform to strict mathematical calculation, it should be based on evidence and not pure speculation. The Court did not suggest that a jury instruction should be used as a substitute for the required proof. The court understood that expert testimony was essential to enable jurors to understand the calculations involved in estimating tax consequences, ". . . the trial bench has developed effective methods of presenting essential elements of an expert calculation in a form that is understandable by juries. . . ." *Norfolk & Western Railway Co. v. Liepelt,* 100 S.Ct. 755, 758 (1980). Evidence of the impact of future income tax

in calculating a damage award is a prerequisite to an instruction.

An instruction to the effect that awards received by settlement or verdict in personal injury actions are not taxable under the federal income tax laws, if unsupported by evidence which would aid the jury in making future predictions of tax consequences, would allow the very speculation which the court has held were too complex for a jury's deliberations. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 236-37 (5th Cir.), (en banc) *cert. denied*, 423 U.S. 839, 96 S.Ct. 68, 69, 46 L.Ed.2d 58 (1975).

The trial court had no discretion to give the requested instruction. It would have been error to do so.

The kind of proof offered in *Liepelt* and approved by the court is not included in the trial court record. Section 104(a)(2) of the Internal Revenue Code which provides that awards received by settlement or verdict in personal injury actions are not taxable was not offered at trial.

IV.

NORFOLK & WESTERN RAILWAY CO. V. LIEPELT, 100 S.Ct. 755 (1980) IS NOT APPLICABLE IN THIS COMMON LAW NEGLIGENCE ACTION.

Where a federal statute creates a wholly federal right but specifies no particular statute of limitations, the general rule is to apply the limitations statute prescribed for analogous actions by the state in which the cause of action arose. A special federal prescription period is created, as federal common law, only when there is a compelling need for uniformity or the nature of the federal right demands a particular sort of prescriptions

period. *Chevron Oil v. Huson,* 404 U.S. 97, 104, 92 S.Ct. 349, 354, 30 L.Ed.2d 296, 304 (1971).

Where Congress has specifically rejected national uniformity and affirmatively provided for the application of state law, then any attempt to create a federal common law rule on a perceived need for uniformity is not within the authority of the courts.

V.

DENIAL OF THE PETITION WOULD PREVENT AN INEQUITABLE RESULT.

On September 8, 1978, three years after Gaedecke's injury, and eighteen months after filing its original answer, Gulf Offshore filed its First Amended Answer in which it raised for the first time its plea to the jurisdiction of the State District Court. The State District Court, with authority to do so, held that it had jurisdiction over the parties and the subject matter of Gaedecke's cause of action.

In reliance on the plain wording of the statute, and on the trial court's denial of Gulf Offshore's plea to the jurisdiction, Gaedecke and Mobil entered into a pre-trial agreement whereby Mobil's liability to the plaintiff would be limited to $200,000.00 in the event that Mobil was not awarded indemnity from Gulf Offshore.

Gaedecke's original Judgment against Mobil has become final. If this Court declares that the courts of the State of Texas have no subject matter jurisdiction to hear causes of action filed pursuant to the Outer Continental Shelf Lands Act, the defense of *res judicata* will be applicable, and the plaintiff will be prevented from

refiling his action in the Federal District Court. Although Mobil's action for indemnity would still be viable, prosecution of the indemnity action would require a duplication of the great amount of time and expense involved in the original preparation and trial of this case. It would also involve a substantial risk that the indemnity action would be unsuccessful thereby reducing plaintiff's recovery by more than 80%.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

EXCERPT FROM STATE COURT BRIEF

FACT STATEMENT

(The Statements contained in Gulf Offshore's General Fact Statement which should have been omitted because they are unsupported by the record are encolsed in brackets and appear in bold type, new matter which has been added by Mobil is italicized, and those statements contained in Gulf Offshore's Fact Statement which are not disputed are in roman).

On the 9th day of July, 1974, Defendant Mobil and Third-Party Defendant Gulf Offshore entered into contract number 1159, which concerned oil well completion operations to be performed by Third-Party Defendant Gulf Offshore on Defendant Mobil's platform wells situated in Grande Isle Block 95 Offshore of the State of Louisiana (DX-3, Tr. 250).

Paragraph 15.4 of the contract was a hold harmless clause running in favor of Defendant Mobil placing responsibility on Gulf Offshore for personal injuries "growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Third-Party Defendant Gulf Offshore under the contract (DX-3, Tr. 257). **[Exhibit B to the contract, which was a boiler plate form drawn by Mobil, and referred to throughout the contract as "attached hereto and made a part hereof" set forth insurance requirements and provided for $100,000 each person", bodily injury liability insurance under a comprehensive liability policy to include, inter alia, "Contractual liability to cover 'hold harmless' clause in our contract" (Tr. 269).]**

Paragraph 15.3 of the Contract permitted Gulf Offshore to be a self-insurer. (DX-3, Tr. 257). *Gulf Off-*

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shore did not purchase liability insurance coverage to cover the "hold harmless" clause in the contract. (Supp. Tr. 85, 86).

Paragraph 12.2 of the contract provided that Gulf Offshore would exercise control over and be responsible for all of its employees who engaged in assisting independent contractors such as service boat operators in performing their services. (DX-3, Tr. 256). *Mobil had no right to direct or control Gulf Offshore's employees except in the results to be obtained.* (DX-3, Tr. 256).

The contract further provided that transportation to and from the platform was **[the work of]** *to be arranged and paid for by* Defendant Mobil (DX-3, Tr. 265), and that Third-Party Defendant Gulf Offshore was to be paid at a reduced rate when, at Defendant Mobil's direction, operations *including evacuation,* were suspended due to weather requiring the rig to be shut down and evacuated. (DX-3, Tr. 252).

Gulf Offshore began performing its work for Mobil at least a year before the accident. (S.F. 152, 155, DX-3). Employees at Gulf Offshore regularly and routinely assisted the boat operator which serviced the drilling platform to load and discharge cargo and personnel, and to handle lines. (S.F. 42, 43, 47, 160, 161, 207, 225, 226, 293, 314). The work which the plaintiff was doing at the time of his accident was the same kind of work he had done many times. (S.F. 217 and 218).

The Evacuation and Accident

In September of 1975, Hurricane Eloise crossed the Yucatan Peninsula into the Gulf of Mexico and regained strength necessitating evacuation of offshore oil platforms in the Gulf, including the platform upon which

Third-Party Defendant Gulf Offshore was performing its completion work for Defendant Mobil (PX-1, S.F. 124, 1.2-8).

Evacuation was to be pursuant to Defendant Mobil's hurricane action plan (PX-2), Defendant was to furnish the transportation for evacuation, **[and Defendant Mobil was responsible for determining when and how the platform would be evacuated (S.F. 153).]** Pursuant to its transportation **[and evacuation]** obligation, Defendant Mobil had arranged for an offshore work boat called the SALTON SEAHORSE, owned and operated by Levy, to stand by for the evacuation (S.F. 32). **[Third-Party Defendant Gulf Offshore had no work to perform with respect to the SALTON SEAHORSE and had nothing to do with its operation (S.F. 205-206).]**

Following preparation for evacuation, **[all activity on the platform ceased]**, all machinery was shutdown, and after evacuation *from the platform* of all but two of the platform workers *employed by Gulf Offshore* by use of the crane, even its generator was shut off (S.F. 186).

During evacuation which took place in the morning on September 22, 1975, Plaintiff was injured. *A short time* prior to his accident, Plaintiff had been safely evacuated from the platform to the work boat by the crane (S.F. 280). *The evacuation continued and* as the last two workers, the crane operator and his helper, attempted to evacuate the platform using a rope to swing from the lowest level of the platform to the after deck of the M/V SALTON SEAHORSE (S.F. 146), the Plaintiff heard *someone* **[who he believes was the Captain of the vessel]** yell down to him to go aft and provide assistance, *but he would have done so without instructions because that was the normal thing to do (S.F. 281).*

It would not have made any difference who yelled at him because he would have gone back to help anyway unless someone grabbed him. (S.F. 294) Plaintiff was swept along the after deck of the vessel and ended up against a pallet loaded with sand when a large wave washed across the aft area of the vessel where he had positioned himself **[following the Captain's command]** (S.F. 283).

The Litigation

Plaintiff sued Defendant Mobil and L. A. Levy, Inc., and Arthur Levy Boat Service, Inc. and Offshore Crews, Inc., for personal injuries sustained as a result of the accident (Tr. 2-7). *Defendant Mobil made a written demand on Gulf Offshore for defense and indemnity* (DX-1), *and after its demand was rejected* (DX-2), Defendant Mobil filed a Third-Party Complaint against Third-Party Defendant Gulf Offshore, alleging liability for indemnity on both tort and contract theories (Tr. 19-21). *Gulf Offshore's Original Answer was a general denial filed on March 28, 1977. On September 8, 1978, eighteen months after filing its original answer and less than ten weeks prior to trial, Gulf Offshore filed its First Amended Answer in which it raised for the first time its plea to the jurisdiction and its special exceptions, including the contention that the Plaintiff was injured while not engaged in operations pursuant to the contract between Mobil and Gulf Offshore (Tr. 38-40).*

Third-Party Defendant conducted no pre-trial discovery (Tr.).

Prior to trial, Plaintiff settled with Defendant Mobil and the Levy Defendants, **[which had assumed Mobil's defense]**. Plaintiff non-suited the Levy Defendants pursuant to **[the]** *his settlement with Levy* **[which further**

contemplated a guarantee to the Plaintiff of at least $100,000.00, a maximum ceiling on Defendant Mobil's liability of $200,000.00, Defendant Mobil's exculpation from liability in the event it secured its indemnity from Third-Party Defendant Gulf Offshore and the supplying of three witnesses to the Plaintiff by Defendant Mobile (S.F. 3-8)] *In consideration of the non-suit, the Levy Defendants guaranteed the Plaintiff a recovery of $100,000.00 (S.F. 6). The Plaintiff then agreed that if Mobil was not awarded indemnity from Gulf Offshore, that Mobil's liability to the Plaintiff would be limited to $200,000.00 (S.F. 6). Mobil agreed to make its three employee witnesses available for trial (S.F. 8). It was also pointed out on the record that Mobil was an additional insured on the Levy insurance policy (S.F. 8). A full disclosure of the settlement agreement between the Plaintiff and Mobil was made on the record and counsel for Gulf Offshore was given a full opportunity to question the attorneys for Plaintiff and Mobil with regard to the terms of the agreement (S.F. 3-8). Gulf Offshore did not request a postponement or a continuance, did not move to sever the indemnity action, and did not move to file a cross-action against the Levy Defendants.* Prior to voir dire examination of the jury panel, the district court assigned twelve peremptory challenges to the Plaintiff and six peremptory challenges to Defendant Mobil, against six peremptory challenges assigned to Third-Party Defendant Gulf Offshore. *After voir dire examination of the jury panel, and before jury selection, Third-Party Defendant made no complaint nor motion. After the jury was selected and empaneled, Third-Party Defendant Gulf Offshore made an unsuccessful attempt to show that the Plaintiff and Mobil had additional agreements regarding trial strategy which had not been*

disclosed (S.F. 9-13) At the same stage Gulf Offshore moved for leave to file a trial amendment and stated that it intended to offer proof of fraud and collusion on the part of the lawyers for Plaintiff and Mobil (S.F. 12).

At the trial, *Defendant Mobil presented proof of the indemnity and hold harmless agreement between Mobil and Gulf Offshore, and the performance by Gulf Offshore of operations contemplated by the contract;* and Defendant Mobil did not contest liability, causation or damages and **[argued for]** *did not argue against* findings favorable to the Plaintiff on the issues against it (Jury Argument 27-28). *Gulf Offshore made no objection to the jury argument of Mobil* (Jury Arguments 23-30, A-6). *Gulf Offshore called no witnesses to the stand and offered no deposition testimony; its only offer of evidence was Mobil's Answers to Plaintiff's Interrogatories Nos. 3, 4, 5 and 7 (S.F. 329-331). No objection was made by Gulf Offshore to Mobil's offer of Defendant's Exhibit 3, the contract between Mobil and Gulf Offshore. (S.F. 324-325). Gulf Offshore made no offer of evidence concerning the settlement agreements between Plaintiff and the original defendants* (S.F.). *At the close of the evidence, Gulf Offshore filed its trial amendment but withdrew Paragraph I of that pleading which contained its allegations of fraud and collusion* (Tr. 185).

Following return of the jury verdict, but before entry of final judgment, it was discovered that Exhibit B to the contract was not physically attached to the copy of the contract admitted into evidence. In a post-trial proceeding, the district court permitted Exhibit B to the contract to be filed **[as a part of the trial record]** along with an affidavit and the court reporter's notes on the proceeding (Motion to Amend S.F. 17-18), *but not as a part of the trial record.*

REPLY POINT 1
(Restated)

The Court of Civil Appeals correctly held that the trial court had subject matter jurisdiction of this case.

(Reply to Petitioner's First Point)

ARGUMENT AND AUTHORITIES UNDER REPLY POINT 1

In an effort to lend some order to its argument, Mobil will discuss chronologically the contemporary and legislative history of the Outer Continental Shelf Lands Act, and the opinions which have attempted to interpret its jurisdictional provisions.

1945

In 1945, President Truman issued a proclamation on the Continental Shelf stating that the Government of the United States "regards the natural resources of the subsoil and seabed of the Continental Shelf beneath the high seas contiguous to the coasts of the United States and appertaining to the United States, subject to its jurisdiction and control." Executive Order 9633, Federal Register 12304 (1945); 59 Stat. 885. The claim of the United States was subsequently recognized by the Geneva Convention on the Continental Shelf.

The Continental Shelf is that part of the continent overlapped by the oceans. In the Gulf of Mexico the average distance from shore to the outer edge of the shelf is approximately 93 miles. The portion of the shelf which lies within historic state boundaries, or three miles from

shore, is estimated to contain less than ten (10%) per cent of the total area of the shelf.

1947-1950

Following the presidential proclamation and the recognition of the claim of the United States by the Geneva Convention on the Continental Shelf, various jurisdictional problems arose between the Federal Government and certain state governments concerning the mineral rights on the Continental Shelf. In 1947, the U. S. Supreme Court overruled prior decisions, and held that the Federal Government had "paramount rights", and that the States had no title to, or property interest in the submerged lands off their respective coasts outside inland waters; only the Federal Government had such proprietary interests. *United States v. California,* 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).

It was recognized that there were conflicting views as to whether or not it was necessary for the U. S. Congress to explicitly confer authority to the executive branch and particularly the Department of the Interior to regulate offshore activity.

1948

In 1948, Title 28 of the United States Code, entitled "Judicial Code and Judiciary", was revised and codified. Sections 1334 through 1361 (Chapter 85) relate to the jurisdiction of the Federal District Courts over various cases and controversies. Congress expressed its intent to grant exclusive jurisdiction to the Federal District Courts in many of the statutes. In so doing, Congress used explicit language: *e.g.*, "The District Courts shall have orig-

inal jurisdiction, exclusive of the courts of the States. . . ."; "Exclusive jurisdiction in the District Court or Court of Claims. . . ."; ". . . such jurisdiction shall be exclusive of the courts of the States. . . ."

1953

Two acts were passed in 1953 to clarify the distinction in federal-state control over the outer Continental Shelf. The Submerged Lands Act of 1953 gave the coastal states exclusive rights to the resources of the Continental Shelf up to three geographical miles from their coasts. Pub.L. No. 31, 67 Stat. 29, 43 U.S.C. 1301 *et seq.* (1953). That act also reaffirmed the jurisdiction, power and control of the United States beyond that point. In effect, the act established the boundaries of the federal and state governmental jurisdiction over the seabed and subsoil of the shelf. There were no provisions for the leasing and development of the area by the Federal Government nor were provisions made for the exchange of state leases for federal leases in the same area. The Outer Continental Shelf Lands Act of 1953 had as its principal purpose the accomplishment of those objectives [1953]. U.S. Code Cong. & Ad. News 2177, 2177-2178.

1965

The revised federal jurisdictional statutes and the Outer Continental Shelf Lands Act had been in effect for seventeen years and twelve years, respectively, when an intermediate appellate court of the State of Louisiana rendered its opinion in *Gravois, et al v. The Travelers Indemnity Company, et al,* 173 So.2d 550 (La. App. 1965, writ ref'd, 247 La. 1016, 175 So.2d 301). The case arose

out of a fatal injury occurring on a fixed platform on the outer Continental Shelf. Suit was filed in a Louisiana state court. The original defendant filed a plea to the jurisdiction. The trial court found that it had jurisdiction but dismissed the plaintiff's claim after finding that the defendants were free of any negligence. The plaintiff appealed. Apparently neither of the attorneys took the defendants' exception to the jurisdiction seriously. According to the appellate court, "The question of jurisdiction is treated by both parties in an offhanded manner and it could almost be said that the defendants have abandoned their argument on the question of jurisdiction." *Id.* at 553.

The majority opinion overruled the lower court and held that the Federal District Court had jurisdiction of the cause of action exclusive of the state courts. The court relied on the language of 28 U.S.C. § 1333(a), the Fifth Circuit's decision in *Pure Oil Company v. Snipes,* 293 F.2d 60 (5th Cir. 1961), and the absence of a clear grant of concurrent jurisdiction to the state courts. According to the court, 28 U.S.C. 1333(a)(2), "strongly implies, though it does not explicitly declare exclusive jurisdiction", 173 So.2d at 555. However, jurisdiction of state courts is not defeated by implication. *Galveston, H. & S. A. R. R. Co. v. Wallace,* 117 S.W. 169 (Tex.) *aff'd,* 223 U.S. 481, 32 S.Ct. 205, 56 L.Ed. 516 (1911).

The second basis for the court's holding was the Fifth Circuit's decision in *Pure Oil* that only federal maritime law was applicable under the Outer Continental Shelf Lands Act and, therefore, under § 1331(1) the Federal District Courts would have original jurisdiction exclusive of the courts of the State. But federal maritime law is not the exclusive body of law applicable to causes of

action arising on the outer Continental Shelf. *Rodrique v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Further, as is ably pointed out in the dissenting opinion in *Gravois,* "The majority error . . . consists in the failure to distinguish between the question of exclusive original Federal jurisdiction and that of the law applicable irrespective of the tribunal wherein the suit may be prosecuted." 173 So.2d at 559.

The majority statement that it is the "clear intent" of the Act to vest all civil and political jurisdiction exclusively in the Federal District Courts is either: 1) a statement that the language of the quoted sections is clear and unambiguous, or 2) that the court has arrived at the intent of Congress from the language of the quoted sections themselves. If the language is clear and unambiguous, congressional intent should play no part in determining what the statute means. Conversely, if the intent of Congress was to be inquired into in order to determine the meaning of statutory language, the accepted canons of statutory construction should have been applied.

The Fifth Circuit Court of Appeals in the *Pure Oil v. Snipes* case did not hold that only federal maritime law was applicable to the outer Continental Shelf. It only held that state law could not apply if it were found to be inconsistent with federal law within the meaning of 43 U.S.C.A. § 1333(a)(2). As stated by the Honorable Ross N. Sterling, in *Friedrich v. Whittaker Corporation,* 467 F.Supp. 1012 (S.D. Tex. 1979), discussed in more detail *infra,* the *Gravois* case is the only case where a court has directly faced the issue of exclusive federal court jurisdiction on the outer Continental Shelf. He further pointed out that "the thoughtful dissent in that case dem-

onstrates that there is room for disagreement as to the intent of Congress in this regard." *Id.* at 1015.

1972

Seven years passed before the jurisdictional provisions of the Outer Continental Shelf Lands Act were again considered in a reported case. Gulf Offshore has cited the annotation at 30 A.L.R. Fed. 535 (1976) which in turn relies on Judge Rubin's decision in *Fluor Ocean Services, Inc. v. Rucker Co.*, 341 F.Supp. 757 (E.D. La. 1972), in support of its argument that the federal courts have exclusive jurisdiction of all causes of action arising out of operations conducted on the outer Continental Shelf. Again, the Honorable Ross N. Sterling pointed out in *Friedrich v. Whittaker* that Judge Rubin did not hold in *Fluor* that federal courts had exclusive jurisdiction in such cases, but merely held that Federal courts had original jurisdiction, 467 F.Supp. at 1015.

The *Fluor* case arose out of a contract to furnish equipment and personnel for use in raising a sunken drilling platform on the outer Continental Shelf. The defendant removed the case to the Federal District Court for the Eastern District of Louisiana. The plaintiff filed a motion to remand contending that the activities contemplated under the contract were only *indirectly* related to operations on the outer Continental Shelf and there was therefore no *original* jurisdiction in the Federal District Court. Under the provisions of 28 U.S.C. § 1441, any action brought in a State Court of which the Federal District Court has *original* jurisdiction may be removed to the Federal District Court. In order to deny the plaintiff's motion to remand to the state court, all that Judge Rubin

had to determine was whether the Federal District Court had *original* jurisdiction. Judge Rubin held that his court had *original* jurisdiction. In arriving at his conclusion that his court had original jurisdiction, Judge Rubin found that it was not necessary that operations conducted on the outer Continental Shelf for the purpose of developing mineral resources be *directly* related to operations on the shelf, that it was sufficient that such activities be *indirectly* related to such operations. The court stated specifically that "*the issue* (emphasis added) presented by the motion to remand is whether this is a case 'arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources.' " 341 F.Supp. at 759. The court thus acknowledged that the question of exclusivity of federal jurisdiction was not even an issue in the case. Nevertheless, the court commented on the exclusivity issue presently before this court. He relied upon three basic premises for his comments: (1) the language of 43 U.S.C. §§ 1332, 1333 (a)(1)(2)(3), § 1333(b) and 43 U.S.C. § 155, (2) the extension to the outer Continental Shelf of other federal legislation including the Longshoremen's and Harborworkers' Compensation Act, the National Labor Relations Act, OSHA, etc.; and (3) that a single federal forum would be more appropriate than multiple state forums to decide disputes that arise on the outer Continental Shelf. Judge Rubin's comments are based on his interpretation of congressional intent and his apparent belief that the Federal District Courts have some special competence that state courts do not have to hear and decide causes of action arising out of operations on the outer Continental Shelf. Since Judge Rubin held only that his court

had original jurisdiction, he simply denied the plaintiff's motion to remand. Had he held that federal district courts had exclusive jurisdiction, he would have been required to dismiss the plaintiff's action as Judge Sterling did in the *Friedrich* case.

If Judge Rubin was accurate in stating that the language of the jurisdictional provisions is clear and unequivocal, he had no need to resort to a determination of congressional intent. Again, if congressional intent was in question, the standard rules of statutory construction should have been applied.

The dissent in the *Gravois* case is a clear refutation of Judge Rubin's comments concerning a single federal forum. The fact that the outer Continental Shelf is to be treated as if it were an area of exclusive federal jurisdiction located within a state does not require resort to a federal court. The state courts have historically exercised general jurisdiction over civil cases arising in federal enclaves such as military installations and national parks. This has been particularly true in the case of negligence actions.

With respect to Judge Rubin's comment that one federal forum would be more appropriate to controversies arising out of activities on the outer Continental Shelf, it should be noted that in the Fifth Federal Judicial Circuit alone there are at least eleven separate districts which include twenty divisions employing more than fifty district judges, who from a practical standpoint are "one federal forum" in name only. Federal Courts are required to interpret and apply state statutes, and state courts are routinely required to interpret and apply federal statutes on an almost daily basis. Irrespective of the forum which might have been chosen by the plaintiff in the present

case, the same law would have been applicable. Congress has expressly provided in the Outer Continental Shelf Lands Act that various state laws are to be applied where they do not conflict with federal law. Congress was not afraid of the "shifting policies of adjacent states" in specifying the substantive law to be applied. It is therefore unlikely that Congress would be concerned that the shifting policies of various forums, federal and state, would be applied in adjudicating causes of action.

Four months after his decision in the *Fluor* case, Judge Rubin decided *Borne v. Tenneco Oil Company,* 1973 A.M.C. 388 (E.D. La. 1972), also relied on by Gulf Offshore in support of its position that the federal courts have exclusive subject matter jurisdiction of this controversy. Judge Rubin simply stated in *Borne* that "[t]hat Act, 43 U.S. Code, § 1333(b), confers exclusive jurisdiction on the U. S. district courts 'of cases and controversies arising out of or in connection with *any operations conducted on* the outer Continental Shelf. . . .'" *Id.* at 389 (emphasis supplied by Rubin). The statement is made without any citation of authority even to the court's own gratuitous comment in the *Fluor* case. According to Gulf Offshore, Judge Rubin's unnecessary comment in the *Fluor* case now forms the basis for its statement that "interpreting case law and secondary source material clearly reflect the exclusivity of federal court jurisdiction over matters pertaining to fixed platforms on the outer Continental Shelf" (Appellant's brief at 24). "It is unnecessary to go further than the wording itself." It is not the wording of the Act which Gulf Offshore asks the Court to rely on, but the absent word "exclusive".

It seems clear that since the language of the Outer Continental Shelf Lands Act does not specifically grant

exclusive jurisdiction to the Federal District Court it must be presumed that the Congress did not intend to convey that meaning. If it had intended to convey that meaning, it would have simply said so, as Congress did in the revision and codification of the federal jurisdictional statutes set out in Chapter 85 of Title 28, United States Code.

It is well settled that if the statute being construed is unambiguous, then a court cannot look to its legislative history. *Espinoza v. Farah Mfg. Co.*, 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 94 S.Ct. 334, 414 U.S. 6, 38 L. Ed.2d 287 (1973); *Ex Parte Roloff*, 510 S.W.2d 913 (Tex. 1974). *Brazos River Authority v. City of Graham*, 163 Tex. 167, 354 S.W.2d 99 (1961); *Texas Health Facilities Commission v. El Paso Medical Surgical Associates*, 573 S.W.2d 291 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); *Ringo v. Gulf States Utilities Co.*, 569 S.W.2d 31 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

If this statute is deemed ambiguous then the traditional canons of construction control the method of interpretation. They require reference, among other things, to the following: (1) the purpose of the legislation, *City of Irving v. Dallas County Flood Control Dist.*, 377 S.W.2d 215 (Tex. Civ. App.—Tyler 1964), *rev'd on other grounds*, 383 S.W.2d 571 (Tex. 1964); (2) contemporary and legislative history, *Texas Medical Branch at Galveston v. U.S.*, 557 F.2d 438 (5th Cir. 1977), *cert. denied* 99 S.Ct. 84 (1978); (3) legislative policy, *Miller v. Calvert*, 418 S.W.2d 869 (Tex. Civ. App.—Austin 1967, no writ); (4) similar statutes, *Shaddix v. Kendrick*, 430 S.W.2d 461 (Tex. 1968); (5) current business usage;

(6) presumptions; (7) omissions, *Simmons v. Armin,* 110 Tex. 309, 210 S.W. 266 (1920); (8) administrative construction, *Brennen v. Goose Creek Consol. Indept. School Dist.,* 519 F.2d 53 (5th Cir. 1975); (9) judicial construction, *Allen Sales & Service, Inc. v. Ryan,* 525 S.W.2d 863 (Tex. 1975); and (10) statutory amendments, *City of Ingleside v. Johnson,* 537 S.W.2d 145 (Tex. Civ. App.—Corpus Christi 1976, no writ).

The purpose of the Outer Continental Shelf Lands Act was to declare the sovereignty of the United States over the subsoil and seabed of the outer Continental Shelf lands lying seaward and outside of state waters, and to establish general guidelines and directives for the Secretary of Interior in managing the natural resources of the outer Continental Shelf. Rep. No. 1835, 95th Cong., 2nd Sess. (1978). *Report on the Activities of the Ad Hoc Select Committee on the Outer Continental Shelf of the House of Representatives.*

Contemporary and legislative history of the Act fails to disclose a congressional intent to vest exclusive jurisdiction in the federal district courts. Prior to and at the time of consideration and passage of the Outer Continental Shelf Lands Act, Congress may be presumed to have had knowledge of the executive declaration by President Truman, the decisions of the U. S. Supreme Court in *U. S. v. California,* 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947); *U. S. v. Louisiana,* 339 U.S. 699 (1950); *U. S. v. Texas,* 339 U.S. 707, 70 S.Ct. 914, 94 L.Ed. 1216 (1950); the 1945 revision of the federal district court jurisdictional statutes in Chapter 85, Title 28 U.S. Code, and the widespread media coverage of the federal-state controversy over offshore mineral rights,

Allen Sales and Servicenter, Inc. v. Ryan, 525 S.W.2d 863 (Tex. 1975); *Marmon v. Mustang Aviation, Inc.,* 430 S.W.2d 182 (Tex. 1968); *Houston Mobilfone, Inc. v. Public Utility Commission,* 565 S.W.2d 323 (Tex. Civ. App.—Eastland 1978, no writ); *Dobbins v. United Super Markets,* 556 S.W.2d 387 (Tex. Civ. App.—Amarillo 1977, writ dism'd.); *Texas Emp. Ins. Ass'n v. Haunschild,* 527 S.W.2d 270 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.). Prior to final passage of the Act, the Chairman of the Senate Committee on Interior and Insular Affairs asked the U. S. Attorney General to compare the Senate and House versions of the proposed Act and offer his comments and suggestions. In reply, the Attorney General stated:

> "S.1901, § 4(b) provides for jurisdiction and venue in Federal District Courts for controversies arising in connection with operations on the outer Continental Shelf, or involving rights there. Section 13 of the House bill makes a similar provision, but only as to proceedings involving a lease or rights under a lease on the outer Continental Shelf. The broader form of the Senate version is preferable, but might itself be broadened to include *all causes of action* (emphasis added) arising on the outer Continental Shelf or structures thereon." S. Rep. No. 411, 83rd Cong., 1st Sess., 33 (1953).

In his Minority Report, Senator Russell B. Long of Louisiana commented that the Senate Committee amendments (doing away with admiralty and maritime jurisdiction) were a vast improvement over the original draft, but decried the overall effect of the Act in allowing the Federal Government to confiscate the mineral resources on the outer Continental Shelf without compensation to

the states. He pointed out that the employees of the offshore operating and drilling companies would be citizens of the adjacent states, particularly Louisiana, and would benefit from the services and facilities provided by state taxpayers. He specifically commented that: "Louisiana provides a system of courts in which the employee will litigate many of his claims", and again, "the Company will make use of our courts." S. Rep. No. 11660, 83rd Cong., 1st Sess. 65 (1953). It is apparent from the Attorney General's letter that he wanted Congress to vest exclusive jurisdiction in the federal district courts, and asked for (but failed to get) specific language which would accomplish his wishes. It is also apparent from Senator Long's minority report that he, a member of the Committee that wrote the Senate version of the Act, understood that State courts would be adjudicating the personal injury actions of offshore workers.

In view of all of the above, it must be presumed that Congress acted deliberately, purposefully, and selected the language of the act with care. *Jessen Associates, Inc. v. Bullock,* 531 S.W.2d 593 (Tex. 1975); *Perkins v. State,* 367 S.W.2d 140 (Tex. 1963); *Morter v. State,* 551 S.W.2d 715 (Tex. Crim. App. 1977); *Miller v. Texas Employers' Ins. Ass'n,* 488 S.W.2d 489 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

The word "exclusive" and the phrase "exclusive of the courts of the states" are clear and unambiguous, and were of long and frequent usage in federal jurisdictional statutes before the Act was considered by Congress. The existence or nonexistence of a particular congressional intent may be inferred if the act under consideration does not contain a certain provision, particularly a phrase of

long and frequent usage. *Red River National Bank v. Ferguson,* 109 Tex. 287, 206 S.W. 923 (1918); *Oden v. Gates,* 119 Tex. 76, 24 S.W.2d 381 (1930); *State v. Jones,* 570 S.W.2d 122 (Tex. Civ. App.—Austin 1978, no writ); *Shell Oil Co. v. Federal Energy Adm.,* 400 F. Supp. 964 (S.D. Tex. 1975). In order to vest the federal district courts with exclusive jurisdiction over all causes of action arising on the outer Continental Shelf, the courts must either supply the omitted word "exclusive" or the phrase "exclusive of the courts of the states", or imply a congressional intent as did the Louisiana court in *Gravois.* Again, under the traditional canons of statutory construction, it is not ordinarily permissible to supply an omission. *Simmons v. Armin,* 110 Tex. 309, 210 S.W. 266 (1920); *Gilmore v. Waples,* 108 Tex. 167, 188 S.W. 1037 (1917); *Simmons v. Armin,* 110 Tex. 309, 210 S.W. 266 (1920); *Texas Pipe Line Co. v. Calvert,* 510 S.W.2d 168 (Tex. Civ. App.—Austin) *rev'd on other grounds,* 517 S.W.2d 777 (Tex. 1974); *A. M. Servicing Corp. of Dallas v. State,* 380 S.W.2d 747 (Tex. Civ. App. —Dallas 1964, no writ). Courts are not permitted to legislate; they must accept statutes as written. *Texas Employers' Insurance Association v. Shirey,* 391 S.W.2d 75 (Tex. Civ. App.—Austin 1965, no writ).

The fact that original statutory language has been modified in a subsequent amendment may also be considered to ascertain legislative intent. *Allen Sales Servicenter, Inc. v. Ryan,* 525 S.W.2d 863 (Tex. 1975); *Marmon v. Mustang Aviation, Inc.,* 430 S.W.2d 182 (Tex. 1968); *Reynolds v. State,* 547 S.W.2d 590 (Tex. Crim. App. 1976); *In Re Corrigan's Estate,* 517 S.W.2d 817 (Tex. Civ. App. —Tyler 1974, no writ); *Lumberman's Underwriter's v.*

State Bd. of Ins., 502 S.W.2d 217 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.). The omission of a significant word from an amendment indicates a desire to change the effect or the interpretation of the Act. *Haverbekken v. Hale,* 109 Tex. 106, 204 S.W. 62 (1918); *City of Ingleside v. Johnson,* 537 S.W.2d 145 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Putman Supply Co. v. Chapman,* 45 S.W.2d 283 (Tex. Civ. App.—Eastland 1932), *affirmed* 76 S.W.2d 469 (Tex. Com. App. § A 1934).

With the exception of the Deepwater Port Act passed in 1975 requiring that state laws applicable to the outer Continental Shelf activities be continually updated, the Outer Continental Shelf Lands Act remained without change until 1978.

1978

On September 18, 1978, Congress amended the Act. Section 1333 subsection (b) of the original Act was entitled "Jurisdiction of United States District Courts" and provided that: "The United States District Courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf. . . ." The 1978 amendments incorporated a new jurisdictional provision in § 1349, subsection (b)(1) of the Act entitled "Jurisdiction and Venue of Actions." The new amendment provides: "The District Courts of the United States shall have jurisdiction of cases and controversies arising out of, . . ." There is nothing in the legislative history which explains why the word "original" was omitted from the 1978 amendments. Throughout the twenty-six year period

from passage of the original act until consideration of the 1978 amendments, lawsuits based on controversies arising out of activities on the outer Continental Shelf were being filed in various state courts. This fact was mentioned in the 1978 Senate debate on the accelerated leasing program and its environmental effects.

> "This list does not include the countless number of suits that have been filed in various state courts." Congressional Records, August 22, 1978, P. S13995.

The impediment to the accelerated leasing program caused by the countless lawsuits in the federal and state courts was the impetus for the new section 1349 of the Act which provides for citizens' suits, and which contains the revised jurisdiction and venue provision. H. R. Rep. No. 1835, 95th Cong., 2nd Sess. (1978).

1979

Judicial construction of a statute may be looked to in determining congressional intent. Twenty-six years have passed since the Act became effective. No state court of last resort has interpreted its jurisdictional provisions. No United States Court of Appeals has faced the jurisdictional issue which must be resolved by this honorable court. On March 27, 1979, the first opinion by a court sitting in Texas, addressing this jurisdictional issue was entered by the Honorable Ross N. Sterling, of the United States District Court for the Southern District of Texas in *Friedrich v. Whittaker Corporation,* cited by Gulf Offshore. In his opinion, Judge Sterling noted that Judge Rubin's opinion in the *Fluor* case did not hold that the Federal Courts had exclusive jurisdiction over the outer Continental Shelf;

that the Louisiana Court in *Gravois v. Travelers Indemnity Co.* was the only court to directly face the issue; and stated that ". . . the thoughtful dissent in that case (*Gravois*) demonstrates that there is room for disagreement as to the intent of Congress in this regard," 467 F.Supp. at 1015. Judge Sterling then clearly stated his reason for holding that exclusive jurisdiction of that cause was in the federal courts and that the state courts had no jurisdiction:

> "If this case were remanded there could be no appeal from the order of remand and the question of the exclusivity of federal court jurisdiction would have to make its way through the state courts with only a mere possibility of resolution by a federal court, where the decision should be made, on a petition for certiorari to the Supreme Court after the state courts have had their say. A dismissal by this court at this stage on the grounds stated would set the stage for a prompt, authoritative resolution of the issue by the federal appellate court." *Id.*

The obvious and express reason for Judge Sterling's holding of dismissal was to put the case in a procedural posture for a direct appeal to the Fifth Circuit on the single issue of exclusivity. If the Act is as clear and unequivocal as Appellant would have one believe, it is difficult to comprehend why Judge Sterling was so desirous of having his decision reviewed immediately by the Fifth Circuit.

The word "original" should never have been used in the 1953 Act. It is clear that the United States District Courts do not have *original* jurisdiction, much less *exclusive* original jurisdiction over all controversies arising

out of operations on the outer Continental Shelf. The Federal District Courts do not have exclusive jurisdiction of admiralty and maritime claims, 28 U.S.C. § 1333; they do not have exclusive jurisdiction of Jones Act Claims, 46 U.S.C. § 688; and they have no jurisdiction in some cases or no exclusive jurisdiction in other cases arising under various federal statutes which have been made applicable to the outer Continental Shelf such as the Longshoremen's and Harborworkers' Compensation Act, the National Labor Relations Act, OSHA, etc., 43 U.S.C. § 1333; 29 U.S.C. § 653.

The Longshoremen's and Harborworkers' Compensation Act vests primary jurisdiction of all claims arising under that Act in a Benefits Review Board, which appeal to the United States Court of Appeals. The Act grants only limited jurisdiction in the Federal District Court to enforce final awards. 33 U.S.C. § 921. The National Labor Relations Act places primary jurisdiction in an Administrator and only limited jurisdiction in the Federal District Court to enjoin violations of acts prohibited by § 215 of the act. 29 U.S.C. § 217, *et seq.* It should be noted that it is the Outer Continental Shelf Lands Act itself which extends the above statutes to the shelf. The Occupational Safety and Health Act gives no jurisdiction to the Federal District Courts. Judicial review of Occupational Safety and Health Review Commission rulings is vested in the United States Court of Appeals. The power to enforce orders of the Commission is also vested in the Court of Appeals. 29 U.S.C. § 660. All contract disputes arising out of public contracts concerning the shelf are handled by an administrative agency with judicial review vested in the United States Court of Claims.

41 U.S.C. § 609. The Disclosure of Welfare and Pension Plans Act provides that actions to recover penalties for violations of the provisions of the Act may be maintained "in any court of competent jurisdiction." 29 U.S.C. § 308. An employee's right to recover benefits due to him under the terms of an employee retirement income security program may be brought in "state courts of competent jurisdiction and district courts of the United States (which) shall have concurrent jurisdiction. . . ." 29 U.S.C. § 1132 (e)(1).

While the above is only a representative sampling of the various federal statutes pertaining to causes of action arising out of activities on the outer Continental Shelf, a review of the applicable statutes shows clearly that the Federal district courts do not have either original or exclusive jurisdiction of even a small fraction of such actions.

Federal courts lack the broad general original jurisdiction of state district courts. Federal courts have *no* common law jurisdiction or power except that which is granted by express statutory language. *Rice v. Minnesota and Northwest Railway Company,* 66 U.S. 358, 1 Black 358, 17 L.Ed. 147 (1861). Statutes conferring federal jurisdiction must be strictly construed. *See,* cases cited in historical digest note 2, pp. 107-08 of 28 U.S.C.A. 1331. The court's statement in *Gravois* that ". . . Had Congress intended to grant concurrent jurisdiction to the state courts it would have so specified . . . failure to do so shows their (sic) intention to retain jurisdiction in the United States Court," resulted from two misconceptions: (1) that the state did not already have jurisdiction; and (2) that the Federal courts did. The Federal courts had

no jurisdiction until it was extended to the outer Continental Shelf by the various Federal statutes. The congressional understanding of that fact is clearly shown by the sectional analysis of the Senate Bill, S. 1901 as reported:

> "Subsection (b) of Section 4 *extends* (emphasis added) original jurisdiction of the Federal district courts to cases and controversies arising out of operations on the outer Continental Shelf. . . ." S. Rep. No. 411, 83rd Cong., 1st Sess. (1953).

A finding by this court that the Federal District Courts have exclusive jurisdiction of common law actions would broaden the language of the Act by implication, and would abrogate the express language of the primary jurisdictional statute, 28 U.S.C. 1331. That statute provides that the Federal district courts shall have original jurisdiction of all civil actions where there is diversity of citizenship or a federal question and the matter in controversy exceeds the sum or value of $10,000. There are many common law actions wherein the matter in controversy is less than $10,000. In order to abrogate the terms of a similar statute, the statutory language must be explicit. The language of the Death On the High Seas Act, 46 U.S.C. § 761, the Jones Act, 46 U.S.C. 688 *et seq.*, and the jurisdictional statute 28 U.S.C. § 1333, all contain very specific language granting jurisdiction to the Federal district courts without regard to the amount in controversy. The Outer Continental Shelf Lands Act contains no such language. Congressional understanding of this point is shown by the language of Section 317 of Title III—Offshore Oil Pollution Fund, proposed proced-

ures to be followed in the event of an oilspill on the outer Continental Shelf:

> "The Federal district courts are to have original jurisdiction *regardless of the citizenship of the parties or the amount in controversy.*" [1971] U.S. Code Cong. & Ad. News 1584, 1597; P.L. 95-372. [Emphasis added.]

There can be no argument that state courts had general and concurrent jurisdiction with the federal courts over common law negligence actions. The grant of jurisdiction to the Federal District Courts which is contained in the Outer Continental Shelf Lands Act does not, of itself, imply that the jurisdiction is to be exclusive. *United States v. Bank of New York,* 296 U.S. 463, 479, 56 S.Ct. 343, 348, 80 L.Ed. 331 (1936).

> "Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the federal and state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by federal statute. *Robb v. Connolly,* 111 U.S. 637; 4 S.Ct. 544; 28 L.Ed. 542 (1884)." *Galveston, H. & S. A. R. Co. v. Wallace,* 223 U.S. 481, 490; 32 S.Ct. 205, 206; 56 L.Ed. 516.

Even if this Court supplies the elusive "exclusive", a literal construction of the mended statute could only be

interpreted as extending the exclusive jurisdiction of the Federal District Court to those cases and controversies which arose out of, or were in connection with operations conducted on the shelf involving exploration for or production of minerals, or out of lease rights. It would not extend the Federal district court's jurisdiction to all causes of action.

Every word of a statute is presumed to be used for a purpose. *Valley International Properties, Inc. v. Los Campeones, Inc.*, 568 S.W.2d 680 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). The clear meaning and purpose of the exclusivity provisions contained in Chapter 85, 28 U.S.C. 1331, *et seq.* is to vest exclusive jurisdiction when and where Congress intended that consequence. The absence of such clear and unequivocal language in the Outer Continental Shelf Lands Act can only mean that Congress did not intend to deprive the State courts of their historic jurisdiction over common law actions.

The purpose of legislation is to guide and clarify, not to confuse and mislead. The interpretation of the Act suggested by Gulf Offshore would lead to an unjust result in the present case. We respectfully submit that this Court should not effect a significant change in statutory language which would cause such an unjust and unintended result.

APPENDIX B

2A Vernon's Texas Rules Annotated,
p. 403 (1976)

Rule 273. Special Charges

Either party may present to the judge and request such written instructions, special issues, definitions or explanatory instructions, as he desires to be given to the jury; and the judge may give them or a part thereof, or he may refuse to give them, as he may see proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any instructions, special issues, definitions or explanatory instructions shall be made separate and apart from such party's objections to the court's charge. As amended by order of October 12, 1949, effective March 1, 1950.

APPENDIX C

2A Vernon's Texas Rules Annotated,
p. 460 (1976)

Rule 276. Refusal or Modification

When an instruction, special issue, definition or explanatory instruction is requested and the provisions of the law have been complied with and the trial judge refuses the same, he shall indorse thereon "Refused," and sign the same officially. If the trial judge modifies the same he shall indorse thereon "Modified as follows: (stating in what particular he has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, special issue, definition or explanatory instruction, when so indorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

APPENDIX D

THIRD PARTY DEFENDANT'S REQUESTED INSTRUCTIONS A, B AND C. FILED: November 22, 1978. Ray Hardy, District Clerk, Harris County, Texas. By. R. Trinkle, Deputy.

Requested Instruction No. A

In connection with the damage issues, you are instructed that any amounts allowed for:

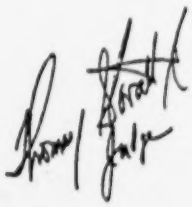
a) physical pain and mental anguish in the future, and

b) loss of earning capacity in the future, and

c) loss of physical capacity in the future, and

d) medical and hospital care in the future,

must be such amounts as are the present value thereof, and reduced to such present value by the use of an appropriate interest rate, prevailing at the time and place of trial, at which money can be safely and securely invested, and the balance shall be your answer.



REQUESTED INSTRUCTION NO. B

In considering the issues submitted by the Court dealing with the question of amount of damages sustained by Stephen Gaedecke, if any, you are instructed that you are not to consider or speculate concerning future inflationary trends or possible future increases in earnings due to increases in productivity, that is you shall not speculate in projection of future damages, if any, about possible future inflationary trends or possible depressions or about possible future wage increases.

Requested Instruction No. C

You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes.